

D.B., Appellant

and

**U. S. POSTAL SERVICE, POST OFFICE,
Buffalo, NY, Employer**

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Case Submitted on the Record

JURISDICTION

ISSUE

¹ 5 U.S.C. § 8101 *et seq.*

date, time, and location of the second opinion examination. For these reasons he argues that the decision on appeal must be reversed.

FACTUAL HISTORY

OWCP accepted that appellant, then a 44-year-old part-time, flexible city carrier, tripped over a curb and injured her left ankle on December 11, 1996 when she fell while in the performance of duty. It accepted the claim for fracture of the medial malleolus of the left ankle. Appellant underwent surgical repair of her ankle with internal fixation on December 16, 1996.² OWCP authorized removal of the surgically implanted hardware by letter of February 5, 1998. In an operative report dated March 23, 1998, Dr. Stephanie M. Harris³ reported that appellant had the hardware in her ankle surgically removed. Appellant subsequently received intermittent treatment, therapy, and vocational rehabilitation. She received compensation on the periodic rolls beginning in February 1997.

By letter dated February 9, 2012, OWCP informed appellant that it needed a current medical report to support her continued receipt of benefits under FECA. An OWCP work capacity evaluation (Form CA-5c) was attached. Appellant was afforded 30 days to provide the information requested. In a letter dated March 2, 2012, appellant's counsel responded to OWCP by reporting that appellant had been unable to find a physician who would perform an evaluation. He requested that OWCP arrange an appointment and examination.

OWCP thereafter referred appellant to Dr. Eugene Saiter, Board-certified in orthopedic surgery. In a report dated May 17, 2012, Dr. Saiter related that he had evaluated appellant and opined that she had reached maximum medical improvement (MMI). He opined that while she could not perform the duties of her date-of-injury job, she could perform sedentary work. Dr. Saiter found that appellant was a candidate for vocational rehabilitation. However, in an addendum report dated October 18, 2012, he admitted that his earlier report contained inaccuracies and that he had provided physical limitations which were not related to her claim. Dr. Saiter amended his earlier restrictions and noted that appellant was still unable to perform her regular job, but could work with restrictions on walking, standing, operating a vehicle, squatting, kneeling, and climbing. He also imposed restrictions on appellant's pushing, pulling, and lifting at work.

In a form dated October 19, 2012, OWCP referred appellant for vocational rehabilitation services, with a goal of employment as a cashier, parking lot attendant, or a sales attendant. It relied on the October 18, 2012 report of Dr. Saiter. A senior claims examiner reviewed the file and completed a memorandum dated November 8, 2012 which determined that the report of Dr. Saiter was internally inconsistent. While Dr. Saiter listed certain employment positions as vocationally appropriate, his physical restrictions on appellant's work were more limited than the requirements of the positions noted. The vocational rehabilitation referral was closed by OWCP.

² The record from 1996 does not contain an explicit acknowledgement that appellant's December 16, 1996 surgical reduction of her left ankle fracture was authorized by OWCP. The record contains an acceptance of the claimed condition dated February 13, 1997.

³ The specialty and Board certifications of Dr. Harris could not be determined from the record.

By letter dated January 22, 2013, the employing establishment offered appellant a modified position and directed appellant to be interviewed in Westfield, New York. In a February 7, 2013 response, appellant's counsel reported that appellant had lived for years in Fort Walton Beach, Florida and requested that she be offered a position in that location.

Because OWCP found the report of Dr. Saiter to be unreliable, another second opinion examination was scheduled for February 13, 2013, however, appellant's counsel requested that it be postponed because appellant was scheduled to be out of the country. It cancelled the appointment and, by letter dated May 24, 2013 informed appellant that an appointment with Dr. Tai Q. Chung, a Board-certified orthopedic surgeon, was scheduled for June 20, 2013.

In a report dated June 20, 2013, Dr. Chung noted that he had reviewed the statement of accepted facts (SOAF) and the questions posed to him by OWCP. He noted from the record that appellant fractured her left ankle when she tripped over a curb on December 11, 1996. Appellant was diagnosed with a trimalleolar fracture and underwent an open reduction internal fixation of the ankle on December 16, 1996. Dr. Chung noted that appellant experienced persistent symptoms and that on March 23, 1998 she had the hardware removed from her left ankle. Appellant reported that she continued to have pain and stiffness in the ankle, but she had no recent treatment. She denied any prior left ankle injury.

Dr. Chung noted that appellant's present complaints included swelling, stiffness, clicking, and constant pain in her left ankle. Appellant stated that the pain worsened with standing and walking and improved with rest. She related that ankle pain kept her awake at night and she had bilateral knee surgery three or four years prior due to arthritis. In addition, Dr. Chung noted that appellant previously underwent varicose vein treatment in both legs five years before his examination. Appellant's history was noted as unremarkable otherwise. On physical examination, Dr. Chung found a well-healed surgery site on appellant's left ankle. He noted tenderness on the anterior aspect of the ankle. Dr. Chung found sensation somewhat decreased, but no instability. Appellant was able to extend and flex her ankle and toes. Her strength was reported as good. Dr. Chung noted swelling in both calves. He took x-rays and reported a healed fracture, joint space seemed well preserved, and there was no osteophyte. Dr. Chung noted the records he reviewed and diagnosed trimalleolar fracture of the left ankle, status post open reduction, and internal fixation. He opined that appellant's fracture had resolved and that she was at MMI with some residuals. Dr. Chung diagnosed some post-traumatic arthritis in her injured ankle. He opined that this would persist and might worsen with time. Dr. Chung determined that appellant was unable to work as a city carrier because she could not lift 70 pounds, could not stand and walk for eight hours a day, and could not push or pull 70 pounds. He opined that appellant could work eight hours a day in a "light-duty position." Dr. Chung identified the following permanent restrictions: stand no more than four hours; sit no more than four hours; and not lift over 20 pounds. Appellant needed to be off her feet for a five-minute break every hour. Appellant was allowed to climb stairs no more than 15 minutes out of an hour and was not allowed to climb ladders. Dr. Chung opined that appellant could perform the duties of a cashier. He noted that, at some point in the future, if appellant's condition worsened, she might need an ankle fusion.

Appellant advised OWCP by letter dated December 17, 2013 that she had relocated to Sacramento, California.

In a letter dated February 25, 2014, an OWCP rehabilitation specialist, referred appellant for rehabilitation counseling and services. OWCP addressed a letter to appellant, also dated April 25, 2013, which informed her that it had determined her to be only partially disabled based on the report and opinion of Dr. Chung. The letter stated that vocational rehabilitation services were appropriate to assist her in finding employment.

In a Form OWCP-44, rehabilitation action report, dated March 3, 2014, the rehabilitation counselor noted that a new vocational evaluation was unnecessary. She noted appellant's prior work as a letter carrier and as a registered nurse. The jobs to be selected for appellant would all involve limited standing and walking and would be sedentary. Following a telephone interview, a vocational rehabilitation report dated March 13, 2014 noted that appellant had worked briefly for the employing establishment and had spent most of her career as a registered nurse for 22 years in New York and California.⁴

The vocational rehabilitation counselor prepared a transferrable skills analysis report dated March 13, 2014. The report indicated the reason for the referral and noted that the analysis was intended to identify a number of feasible jobs, generally available in appellant's local labor market, within her physical limitations and compatible with her transferrable skills. The job search took into account appellant's work history as a nurse and a letter carrier, her vocational evaluation, education, and experience. The search was limited to positions in the light to sedentary range and which required only limited standing and walking. The report noted appellant's belief that she would not benefit from additional training. Appellant also expressed reservations about her ability to fulfill the physical demands of a nursing position. The vocational rehabilitation counselor identified telemarketer and receptionist work as being sedentary and readily available in the Sacramento area. Those positions required no training. In addition, the report also identified the possible positions of: accounting clerk, receptionist, hospital admitting clerk, and dispatcher. The vocational rehabilitation counselor reported that each occupational category was projected to grow and would continue to be available in appellant's area. The file contains a Form OWCP-66, job classification, dated April 5, 2014 for an information (reception) clerk and a separate form for a telemarketer. The forms provided a full-position description, list of physical demands, and average weekly wage and availability information for each job. The job duties were within the physical restrictions imposed by Dr. Chung.

A labor market survey dated April 5, 2014 showed that both the information clerk and telemarketer positions were available in sufficient numbers. By letter dated April 10, 2014, OWCP informed appellant that her vocational rehabilitation plan had been approved for 90 days of placement services. The record shows progress reports by the vocational rehabilitation counselor dated April 6, May 3, June 1 and 30, July 20, and August 1, 2014. These reports document appointments, counseling, and conversations during the period of vocational rehabilitation services. Appellant focused her interview efforts on job vacancies close to mass transit because she did not own her own automobile. The record contains another labor market survey dated July 8, 2014 which documents the availability of telemarketer and information clerk positions in appellant's area.

⁴ Appellant had earned a BSN degree and RN certification in 1973.

By facsimile to the vocational rehabilitation specialist dated July 25, 2014, the vocational rehabilitation counselor reported that appellant's services would terminate effective July 28, 2014, as appellant had not found employment and that the counselor did not recommend continuation of services. In a closure memorandum dated September 12, 2015, appellant was described as diligent and earnest in her efforts, but she did not find employment. The rehabilitation counselor opined that given appellant's relative lack of experience and long period outside the labor market, her reasonable salary expectation would be the minimum wage of \$9.00 an hour.⁵

Appellant was scheduled for another second opinion examination with Dr. Aubrey Swartz, Board certified in orthopedic surgery, who provided a report dated March 17, 2015. Dr. Swartz took a history which summarized appellant's injury and surgical care. He noted that she had not seen a doctor for her left ankle since 2013 or 2014. Dr. Swartz added that appellant could not recall the last time she saw a doctor for treatment of her left ankle. Appellant complained of numbness and constant pain in her left ankle as though she were "walking on her bone." Most of her left ankle pain was reported as central rather than the left or right side.

Dr. Swartz performed a physical examination. He noted that appellant's arches were good, but that she had a limp. Appellant stated that she used a cane. Dr. Swartz noted numbness and tenderness in different areas of the left foot and ankle. He identified the records he reviewed which began in 1996 and included the x-ray and the report of Dr. Chung from 2013. Dr. Swartz noted that appellant had established post-traumatic arthritis in her left ankle. Appellant had some limitation on range of motion, numbness, and pain, and a limp. Dr. Swartz recommended an ankle brace and found appellant's prognosis fair. He went on to opine that appellant could work eight hours in a modified-duty position with the following permanent restrictions: sit no more than eight hours; walk no more than four hours; and stand no more than six hours a day. Appellant could not use her arms and hands in repetitive movements for more than eight hours, reach above the shoulder for more than eight hours, and to twist, bend, or stoop for more than eight hours. Appellant also could not drive for more than eight hours. Dr. Swartz' additional restrictions were that she could not push, pull, or lift more than 10 to 20 pounds for more than eight hours. He found appellant at MMI.

On July 28, 2015 OWCP issued a notice of proposed reduction of appellant's compensation, finding that she was partially disabled, and Department of Labor, *Dictionary of Occupational Titles* (DOT) # 299.357-014 able to work as a telemarketer, earning \$360.00 per week.⁶ It reduced her compensation to account for this wage-earning capacity, applying the

⁵ The Board notes that the file contains several additional pieces of correspondence from the employing establishment concerning whether appellant might be placed in a limited-duty position. The record is inconclusive regarding the outcome of any initiatives by the employing establishment. In letters to OWCP dated July 7, 2014 and January 24, 2015, an employing establishment manager requested medical information and stated that a vacant position existed in western New York. OWCP responded by letter dated August 25, 2014 and provided recent medical information. Copies of this response were also mailed to appellant and to her representative.

⁶ This weekly salary represents 40 hours of work at \$9.00 an hour.

*Shadrick*⁷ formula. This calculation was extensively explained in a July 28, 2015 wage-earning capacity memorandum included in the file. OWCP relied on the March 17, 2015 report and opinion by Dr. Swartz. The decision also referenced the June 20, 2013 report of Dr. Chung which also found that appellant was not totally disabled and which formed the basis for her referral for vocational rehabilitation services beginning in February 2014. The notice of proposed reduction allowed appellant 30 days in which to respond.

The record also contains a Form CA-816, computation of appellant's earning capacity, dated July 23, 2015.⁸ The form shows appellant's earnings at the time of her accident in 1996 and itemizes the adjustments in those earnings to reach an adjusted figure in 2015, in accordance with the *Shadrick*⁹ formula. In addition to the CA-816 form, there is a memorandum to the file dated July 28, 2015 which explains the adjustment and reduction of appellant's benefits.

Appellant submitted an August 20, 2015 letter from her counsel and her own letter dated August 19, 2015. In addition, she provided a copy of page 7 of the second opinion report of Dr. Swartz and an OWCP CA-5 completed by Dr. Swartz dated April 2, 2015. Appellant disagreed with the proposed reduction in her benefits and described her medical conditions in a letter dated August 19, 2015. She mentioned bilateral surgeries on her knees, surgery for varicose veins in her legs, degenerative lumbar disease, arthritis in her legs and back, and her noticeable limp and use of a cane. Appellant also stated that she was 63 years old and took medication every four to six hours for pain. Appellant's counsel provided a two paragraph letter dated August 20, 2015 and alleged a conflict of medical opinion between Dr. Swartz and an unspecified report from appellant's treating physician.

By decision dated September 24, 2015, OWCP finalized the reduction of appellant's compensation finding that the position of telemarketer was medically and vocationally suitable. It determined that Dr. Swartz represented the weight of the medical evidence and that there was no other medical opinion in the case file which could create a conflict of opinion evidence. OWCP noted that the last report by a physician treating appellant was in 2003 and that the last second opinion examination was in 2013. It observed that the reports of Dr. Swartz found appellant to be partially rather than totally disabled. The decision discussed appellant's unrelated medical conditions and found that the combination of appellant's work-related condition and any preexisting conditions when combined, did not prevent her from working as a telemarketer. Furthermore, appellant's medical conditions which developed subsequent to her accident in 1996 did not affect her ability to work. Attachments to the decision explained how appellant's wage-

⁷ The memorandum cites FECA Procedure Manual Chapter 2.815.4c(2)(a) which explains the application of the formula contained in the *Shadrick* opinion. *Albert C. Shadrick*, 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁸ The record also contains an earlier wage-earning capacity CA-816 dated April 20, 2011.

⁹ *Albert C. Shadrick*, *supra* note 6.

earning capacity was calculated pursuant to the *Shadrick* formula.¹⁰ Appellant's compensation was reduced to \$489.00 every four weeks.¹¹

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹² Section 8115(a) of FECA,¹³ provides that in determining the compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if those actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.¹⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁵ The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area where the employee lives.¹⁶ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹⁷

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor, authorized by OWCP, for selection of a position, listed in the Department of Labor, *Dictionary of*

¹⁰ *Id.*

¹¹ The compensation rate includes a deduction to cover appellant's life insurance premiums.

¹² *Andrew Wolfgang-Masters*, 56 ECAB 412 (2005).

¹³ 5 U.S.C. § 8115(a).

¹⁴ *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. §8115(a).

¹⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1984).

¹⁶ *Id.*

¹⁷ *Steve M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁸ *William H. Woods*, 51 ECAB 465 (2004).

¹⁹ *John D. Jackson*, 55 ECAB 465 (2004).

Occupational Titles or otherwise available on the open market, that fits the employee's capabilities with regard to physical limitations, education, age and prior experience. Once this selection has been made, a determination of wage rate and availability in the open market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*²⁰ will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured worker's monthly pay.²¹

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury.²²

The fact that a claimant is unable to secure employment does not establish that the constructed position is not vocationally suitable.²³ Impairments that preexisted the employment injury, in addition to injury-related impairments, must be taken into consideration in selecting a job within a claimant's work tolerance. However, subsequently acquired impairments unrelated to the injury are excluded from consideration in determining work capabilities.²⁴

ANALYSIS

By decision dated September 24, 2015, OWCP finalized a reduction in appellant's compensation to reflect her ability to earn wages as a telemarketer. Before making that determination, it must determine appellant's medical condition and work restrictions and then select an appropriate position that reflects her wage-earning capacity. The medical evidence used by OWCP must provide a detailed description of appellant's condition.²⁵ The Board has carefully reviewed the second opinion report of Dr. Swartz. Dr. Swartz' report has reliability, probative value, and a convincing quality with respect to the issue on appeal.²⁶ That issue is whether appellant is at MMI and is able to work as a telemarketer Dr. Swartz based his opinions on a proper factual and medical history. Dr. Swartz made findings on physical examination. He reviewed and summarized the relevant medical evidence.²⁷ Dr. Swartz recommended that

²⁰ *Supra* note 6.

²¹ *Karen L. Lonan-Jones*, 50 ECAB 293 (1999).

²² *Supra* note 6.

²³ *Lawrence D. Price*, 54 ECAB 590 (2003).

²⁴ *Gary L. Moreland*, 54 ECAB 638 (2003).

²⁵ *William H. Woods*, 51 ECAB 619 (2000).

²⁶ *R. W.*, Docket No. 12-375 (issued October 28, 2013).

²⁷ *Melvina Jackson*, 38 ECAB 443 (1987).

appellant work in a sedentary position with restrictions on walking and standing which would account for her foot and ankle injury pushing, pulling and lifting which were consistent with the physical demands of the telemarketer position.

Initially, the vocational rehabilitation counselor determined that appellant's choice of employment was a position that did not require additional training. After a job search of the Department of Labor, *Dictionary of Occupational Titles*, the counselor decided on a telemarketer position as being the best option. A labor market survey demonstrated that this position was available in appellant's area of Sacramento, California. The counselor and appellant confirmed that there were job vacancies in areas of the city served by mass transit which accommodated appellant's transportation needs. The Department of Labor, *Dictionary of Occupational Titles* description of the job, when matched against appellant's college degree and prior work experience, made it clear that she would need no specialized training to start work. The OWCP-66 form makes clear that the job was in the sedentary range of physical activity and that appellant would not need to stand or walk to perform the duties of the job. The Board finds that OWCP properly determined that the job of telemarketer reflected appellant's wage-earning capacity. The Board also finds that the record documents that OWCP properly applied the *Shadrick* formula to determine appellant's compensation, wage-earning capacity and her final, reduced benefit amount.²⁸

Appellant's counsel has not challenged the accuracy of the calculation of appellant's new benefit, nor has he questioned the wage-earning capacity figure itself. Rather, he argues that a conflict exists between the opinion of Dr. Swartz, the second opinion physician for OWCP, and appellant's treating physician. Counsel did not offer the date or the substance of any specific note, letter, or report from a doctor offering an opinion that appellant is not able to work as of September 24, 2015. The record does not contain any evaluation by an attending physician that is less than 10 years old. The Board has held that stale evidence cannot create a conflict of medical opinion or require the selection of a referee physician.²⁹

Appellant's counsel also argues that because he did not receive an attachment to OWCP's letter dated February 2, 2015, the opinion of Dr. Swartz should be excluded from the record. The attachment identified the date, time, and place of the examination. The Board has held that a defective notice to an appellant's attorney is not a sufficient reason to exclude a medical opinion from the record.³⁰ In the current appeal, the representative acknowledged that he received a notice that his client was to undergo a second opinion examination. Assuming appellant's representative had this information, he was obligated on behalf of his client to inquire about the details.

Appellant argues that she is unable to perform the telemarketer job because of her various health problems. Her claim was accepted only for a fracture of the left ankle. Appellant's

²⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17.d (February 2011); *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816 (June 2013).

²⁹ *K.C.*, Docket No. 14-853 (issued December 1, 2014).

³⁰ *B.J.*, Docket No. 13-543 (issued June 20, 2013).

arthritis, knee surgeries, low back problem arose after her December 11, 1996 employment injury. Therefore, they do not constitute preexisting conditions which would preclude consideration of work as a telemarketer.³¹

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective September 24, 2015 based on its determination that the constructed position of telemarketer represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 24, 2015 is affirmed.

Issued: June 9, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

³¹ Any incapacity to perform the duties of the selected position resulting from subsequently-acquired positions is immaterial to the loss of wage-earning capacity which can be attributed to the accepted employment injury. *See C.J.*, Docket No. 07-598 (issued November 1, 2007); *William H. Woods*, 51 ECAB 619 (2000).